No. 85-1812

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

October Term, 1985

FRANCIS THOMAS DEUTSCH,
Petitioner/Defendant,

v.

STATE OF NEW MEXICO,
Plaintiff/Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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EDITOR'S NOTE

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Wednesday, February 5, 1986

NO. 16,226

FRANCIS THOMAS DEUTSCH,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 8355 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX B

B-1

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

FRANCIS THOMAS DEUTSCH,

Defendant-Appellant.

No. 8355

FILED
'85 DEC 31

APPEAL FROM THE DISTRICT COURT OF
BERNALILLO COUNTY

Philip R. Ashby, Judge

John J. Kelleher
c/o Franchini, Henderson & Wagner

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OPINION

WOOD, Judge.

This appeal involves convictions and sentences of Deutsch for conspiracy, larceny, fraud, embezzlement and forgery in two criminal cases--Bernalillo County District Court Cause Nos. 37206 and 37738. We (1) state the factual background; and discuss (2) enforcement of a plea bargain; (3) the prosecutor's allegedly late disclosures; (4) interception of Deutsch's personal mail; (5) testimony from Deutsch's attorneys; (6) testimony of a questioned documents examiner; and (7) sufficiency of the evidence for the forgery convictions.

FACTUAL BACKGROUND

Deutsch was the sole stockholder of E.F.D. Capital Group, Inc., a New York corporation (EFD). In the spring of 1983, EFD purchased all the stock of two New Mexico corporations, Continental Mortgage, Inc. (Continental), and Guaranteed Equities, Inc. (Guaranteed). According to Deutsch, Continental and Guaranteed were operated as a single mortgage brokering business. According to Deutsch, "all three corporations were treated as the sole proprietorship of Deutsch commencing in or about May, 1983."

In the summer of 1983, the Financial Institutions Division of the Regulation and Licensing Department (FID) investigated financial activities involving Guaranteed. On August 19, 1983, FID brought a civil suit in Santa Fe County District Court seeking various items of relief. A temporary solution was negotiated. An order was entered September 26, 1983, which, among other things, appointed Harold Douglass as trustee of Guaranteed.

On September 28, 1983, the indictment in Cause No. 37206 was filed. The indictment named Deutsch and Continental as

defendants and charged both conspiracy to commit fraud and fraud. Both Deutsch and Continental entered plea agreements. Deutsch's agreement, dated September 29, 1983, provided that no additional criminal charges would be filed relating to any *past* criminal activity involving Deutsch, Continental, Guaranteed, EFD, or affected companies in connection with the conduct of those businesses in New Mexico, their assets, liabilities and contracts.

On February 14, 1984, the indictment in Cause No. 37738 was filed. The indictment named Deutsch as a defendant and charged various crimes in seventeen counts. All counts charged criminal activity *subsequent* to the plea agreement of September 29, 1983. Two of the charges were dismissed; Deutsch was convicted of fifteen counts.

The transactions involved in the fifteen convictions in Cause No. 37738 are:

(a) Eloy Romero loan. The loan was refinanced. An Omega Funding Corporation (Omega) check in the amount of $31,240.44 was made payable to Guaranteed. This check was endorsed with the name of Guaranteed and the initials "F.D." On the basis of this endorsement of Omega's check, First Interstate Bank issued its cashier's check in the same amount, payable to Guaranteed. The cashier's check was endorsed in the name of Guaranteed, "F. Deutsch, president" and was cashed at a truck plaza in New Jersey. Deutsch was convicted of larceny of the Omega check, forgery on the basis of the endorsement of the Omega check, and forgery on the basis of the endorsement of the cashier's check. These were counts Nos. 1, 2 and 3.

(b) Canaday loan. Attorneys Prelo and Grodner foreclosed this loan on behalf of Guaranteed. At a foreclosure sale, Guaranteed bought the property securing the loan. Canaday found a buyer to redeem the property and Guaranteed agreed to sell to the buyer. Prelo and Grodner handled the matter; they issued their trust

account check, in the amount of $40,155.43, payable to Guaranteed. Deutsch picked up the check from Prelo. The check was endorsed in the name of Guaranteed, "Frank Deutsch, pres." and was cashed at the truck plaza in New Jersey. Deutsch was convicted of fraud and forgery. These were counts Nos. 4 and 5.

(c) Garcia and Rael loans. When Grodner (see (b) above) noticed the endorsement on the trust account check, he questioned Deutsch about it. Deutsch said he would straighten things out and later gave Grodner three checks. Two of these three checks involved the Garcia and Rael loans. Omega issued its check for $22,592.80, payable to Guaranteed, as a pay-off of the Garcia loan. The Omega check was endorsed in the name of Guaranteed, "F. Deutsch, Pres." and exchanged for a New Mexico Federal Savings & Loan Association (N.M. Federal) check in the same amount. Deutsch delivered the N.M. Federal check to Grodner as part of the pay-off of the Canaday loan. Deutsch was convicted of embezzlement and forgery in connection with the Omega check. These were counts Nos. 13 and 14. Tucumcari Federal Savings & Loan Association issued its check in the amount of $13,956.68, payable to Guaranteed, as a pay-off of the Rael loan. Deutsch delivered this check to Grodner as part of the pay-off of the Canaday loan. Deutsch was convicted of larceny of this check. This was count No. 15.

(d) Haws loan. A bank in California issued its check in the amount of $22,749.73 to pay off this loan. The check was payable to Guaranteed, "Harold Douglass Trustee." The check was endorsed in the name of Guaranteed and in the name of the trustee, "H. Douglass, Trustee," and underneath the purported Douglass signature, "F. Deutsch Pres." The check was cashed at the truck plaza in New Jersey. Deutsch was convicted of larceny and forgery. These were counts Nos. 6 and 7.

(e) Torres loan. Torres had overpaid his loan and wanted reimbursement for the overpayment. The records of the trustee did not show that the loan had been paid off. Territorial Abstract & Title

Co., Inc. (Territorial) had handled the transaction. The trustee checked with Territorial; it provided the documentation. The exhibit, which is an attachment to another exhibit, is of poor quality and is difficult to read. However, there was testimony that Territorial had issued its check No. 6247 in the amount of $12,398.00 payable to Guaranteed. The check had been endorsed in the name of Guaranteed, "F. Deutsch, Pres." and was cashed at the truck plaza in New Jersey. Deutsch was convicted of larceny and forgery. These were counts Nos. 8 and 9.

(f) Radaelli loan. Omega issued its check in the amount of $89,005.00 as a pay-off of this loan. The check was payable to Guaranteed. The Omega check was endorsed in the name of Guaranteed, "F. Deutsch, Pres." and exchanged for a N.M. Federal check payable to Guaranteed. The N.M. Federal check was endorsed in the name of Guaranteed, "F. Deutsch, Pres." and was cashed at the truck plaza in New Jersey. Deutsch was convicted of embezzlement and two counts of forgery. These were counts Nos. 10, 11 and 12.

The foregoing outlines the transactions and the convictions in Cause No. 37738. There is evidence that Deutsch lacked authority to negotiate checks payable to Guaranteed during the time period involved. There is evidence that Deutsch executed releases on deeds of trust given in connection with some of the loans, but was without authority to do so. There is testimony from Mr. Yudis, who arranged the check cashing in New Jersey, about Deutsch's promise to "arrange" a vacation for Yudis so that he could avoid testifying. Yudis was subpoenaed and testified under a grant of immunity.

Deutsch does not challenge the sufficiency of the evidence for his larceny, fraud and embezzlement convictions in Cause No. 37738.

ENFORCEMENT OF PLEA BARGAIN

The plea bargain agreement in Cause No. 37206 provided that the sentence would be as provided by law but would not be imposed until sixty days after the completion of an audit of Guaranteed in connection with the civil case.

After the indictment in Cause No. 37738 was returned, Deutsch moved for enforcement of an agreement between the Attorney General, Deutsch and his attorney, which was executed contemporaneously with the plea bargain. This agreement provided that if Deutsch complied with court order in the civil suit *and* if investors on some forty-five identified loans had been repaid, "the State will recommend to the sentencing court that the defendant be placed on probation." An alternative to repayment of the investors was an approved repayment plan. We do not concern ourselves with repayment or a plan for repayment because neither matter if Deutsch did not comply with the order in the civil suit. This is because "and" in the agreement is used in the conjunctive. *See Davis v. Savage*, 50 N.M. 30, 168 P.2d 851 (1946).

Deutsch contends that at the hearing on Deutsch's motion to enforce the agreement, the evidence was uncontroverted that he complied with the agreement except to the extent that the state's interference made compliance impossible. This argument ignores the result of the hearing. The trial court stated that it would wait to see what happened in Cause No. 37738 before deciding whether Deutsch complied with the agreement.

After the convictions in Cause No. 37738, sentence was imposed in Cause No. 37206. At the time of sentencing, the evidence showed that Deutsch had not complied with his agreement. In the civil suit, the court appointed Douglass as trustee with total control over all receipts and disbursements of Guaranteed and ordered Deutsch not to take any action interfering with or impeding the trustee. The facts leading to the convictions for larceny, fraud and embezzlement established noncompliance with the orders in the

civil suit. Deutsch was not entitled to probation in Cause No. 37206, and the prison sentence in Cause No. 37206 was not contrary to the agreement.

ALLEGED LATE DISCLOSURE BY THE PROSECUTOR

In Cause No. 37738, Deutsch contends the trial court erred in denying his motion for a hearing or alternatively for dismissal of the charges. The motion claimed late and incomplete discovery which amounted to prosecutor misconduct.

On the morning that trial began, the prosecutor produced four tapes. When one of Deutsch's counsel, on the following day, went to the Attorney General's office in Albuquerque to review the four tapes, ten more tapes were produced.

Deutsch's counsel contended the prosecutor did not know how many tapes there were. The prosecutor contended he had made the tapes available but that no defense counsel listened to the tapes in advance of trial and did not get around to listening to the tapes until the trial was underway. The trial court refused to hear evidence on the conflicting contentions. It is not disputed that discovery of documents had been completed prior to trial, that this discovery included offense reports, and these reports referred to the tapes. Deutsch asserted that a hearing was necessary to show the prosecutor was surprised at the number of tapes.

We need not decide whether the trial court erred in not conducting an evidentiary hearing and in not making a specific ruling on whether there had been a discovery violation by the prosecutor.

When the issue of late discovery was raised, the trial court stated it would rule later. At the end of the trial day, the trial court excused the jury for the next day (Friday), thus giving the defense a three-day weekend to listen to the tapes and do other preparation

as deemed necessary. On the following Monday, the trial court asked the defense how Deutsch had been prejudiced. The defense replied that it had already cross-examined Douglass and would have cross-examined him on the basis of the contents of the tapes. The trial court ordered that Douglass return to the witness stand, and the defense cross-examined him extensively.

Remedies for violation of discovery rules or orders are discretionary with the trial court. *State v. Johnson*, 91 N.M. 148, 571 P.2d 415 (Ct.App.1977). If there is a violation, Deutsch is not entitled to relief unless he has been prejudiced by the violation. *State v. Perrin*, 93 N.M. 73, 596 P.2d 516 (1979); *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979).

Assuming, but not deciding, that there was a discovery violation, the trial court provided a remedy for the claimed prejudice; the cross-examination took place. *See State v. Pedroncelli*, 97 N.M. 190, 637 P.2d 1245 (Ct.App.1981). There being no other claim of prejudice, the trial court did not err in its disposition of Deutsch's discovery claim.

INTERCEPTION OF PERSONAL MAIL

An issue at the trial of Cause No. 37738 was whether Douglass, the court-appointed trustee, had intercepted or caused to be intercepted, the personal mail of Deutsch.

There is evidence that Douglass discovered that checks intended for Guaranteed were being intercepted and cashed with an endorsement purporting to be that of Deutsch. Douglass instituted tighter control over the mail. Douglass admitted that he ordered *all* mail addressed to Guaranteed be opened even if Deutsch was also an addressee. Douglass denied, but other witnesses affirmed, that Douglass ordered the interception of all mail, including mail addressed only to Deutsch.

Deutsch asked for a hearing on tainted evidence. Because there was no such hearing in the trial court, Deutsch contends that all convictions in Cause No. 37738 must be reversed. Deutsch states: "Having made a prima facie showing that Douglass made an illegal search of his personal mail, Appellant was entitled to an evidentiary hearing at which the burden of proof should have been placed on the State to prove that their case was untainted."

Deutsch relies on *Nardone v. United States*, 308 U.S. 338, 84 L.Ed. 307, 60 S.Ct. 266 (1939). We agree that *Nardone* is controlling authority; however, Deutsch misreads that decision. Deutsch contends that only two steps are involved in deciding the question of evidentiary taint; that once there was evidence of taint then the prosecutor must prove the absence of taint. This is incorrect. Once there was evidence of taint (the first step), then defendant had the opportunity to prove that a substantial portion of the case against a defendant was a fruit of the taint (the second step). Only after a defendant has satisfied the second step does the burden shift to the prosecutor. *Nardone* states:

> The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that . . . [Deutsch's mail was unlawfully intercepted]. Once that is established . . . the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.
>
> . . . [C]laims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity . . . .

The trial court assumed, but did not decide, that step one was satisfied, that there was proof of unlawful action. The trial court

inquired as to step two. Deutsch responded that the opening of his personal mail led to knowledge by the state concerning personal affairs such as travel, other business dealings and other lawsuits. Deutsch could not state, and made no tender, that knowledge of his personal affairs had anything to do with the trial. Rather, Deutsch contended that he could not know whether any portion of the case against him was tainted without a hearing, and that the entire investigation was tainted. However, Deutsch did not disagree when the prosecutor responded that the most important part of the case was the checks; Deutsch never claimed that the checks were tainted evidence.

Deutsch did not satisfy his burden as to step two; the burden never shifted to the prosecution to prove that its case against Deutsch was based on untainted evidence. The trial court did not err in failing to conduct the requested hearing, there being an insufficient showing of taint to invoke a further hearing.

TESTIMONY FROM DEFENDANT'S ATTORNEYS

Deutsch contends the indictment in Cause No. 37738 should have been dismissed because of the use of testimony by Deutsch's attorneys. This issue involves two sets of attorneys: (a) Prelo and Grodner, and (b) King.

(a) Prelo and Grodner

These attorneys testified to events in connection with the Canaday loan, a matter that they handled on behalf of Guaranteed. Deutsch does not attempt to demonstrate that they were his attorneys, so that an attorney-client relationship might exist. Deutsch assumes they were his attorneys. We made the same assumption because the trial court's ruling was not on the basis of the existence of an attorney-client relationship. However,

because of the trusteeship, *see Commodity Futures Trading Commission v. Weintraub*, __ U.S. __, 85 L.Ed.2d 372, 105 S.Ct. 1986 (1985).

Deutsch complains of the testimony of these attorneys before both the grand jury and the trial jury. It is not necessary to consider the different functions of the two juries in order to decide this issue. However, *see Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 (1981).

Assuming there was an attorney-client relationship, there was no attorney-client privilege. NMSA 1978, Evid. Rule 503(d)(1) (Repl.Pamp.1983) states there is no privilege under this rule, "[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud[.]" Deutsch was convicted of fraud in connection with the attorneys' trust account check, and convicted of embezzlement and larceny on the basis of his efforts to cover up the fraud. The attorney services involved were obtained to enable Deutsch to commit the crimes.

Deutsch does not seriously contend that an attorney-client privilege existed. Rather, he contends the attorneys breached an ethical obligation to him by testifying. Deutsch relies on the American Bar Association Model Code of Professional Responsibility. Canon 4 of that Code is similar to New Mexico's Code of Professional Responsibility, NMSA 1978, Code of Prof.Resp. Rule 4-101(B) (Repl.1985), which states, as a general proposition, that a lawyer shall not knowingly reveal a confidence or secret of his client. Deutsch also relies on the discussion of ethical considerations in the American Bar Association Code. That discussion is to the effect that the ethical consideration is more extensive than the privilege. In sum, Deutsch's argument is that the ethical consideration of not revealing a client's secrets barred the testimony of the attorneys even though no attorney-client privilege applied to their testimony.

Assuming, but not deciding, that ethical considerations might bar the testimony of the attorneys under the facts of this case, what follows from a violation? Deutsch contends the violation denied him due process of law and the effective assistance of counsel contrary to both the federal and state constitutions. The trial court invited authority in support of this claim; none was supplied. The contention is renewed in this court, again without citation of authority.

An issue raised on appeal will not be reviewed if the issue is not supported by cited authority. In this situation, we assume an absence of supporting authority. *In Re Adoption of Doe*, 100 N.M. 764, 676 P.2d 1329 (1984); *see State v. Callaway*, 92 N.M. 80, 582 P.2d 1293 (1978). Further, Deutsch, as appellant, had the burden of demonstrating prejudicial error. *See State v. Pruett*, 100 N.M. 686, 675 P.2d 418 (1984). Quite apart from the absence of supporting authority, Deutsch makes no effort to demonstrate that the testimony of an attorney handling a civil matter deprived him of due process in this criminal case or deprived him of effective assistance of counsel in this criminal case.

(b) King

Attorney David W. King, on behalf of Deutsch, wrote a letter to the trial judge in the civil suit, stating that some $200,000.00 in checks payable to Guaranteed had been sent to New York and there endorsed by Deutsch's employees. The letter specifically refers to the Torres loan, one of the transactions involved in Cause No. 37738. According to the letter, this was all a big mistake.

Deutsch asserts the trial court erred in permitting King to testify that he wrote the letter and to authenticate his tape-recorded conversation with Deutsch, which was the basis for the letter. Deutsch argues that the tape and the letter were "sensitive and confidential" communications not within the crime exception to the attorney-client privilege. *See* Evid.R. 503(d)(1). This argument is irrelevant. The trial court admitted the testimony and the tape on

the basis that there was no confidential communication because the communication was intended to be disclosed to third persons, *see* Evid. Rule 503(a)(4), and, therefore, the communication was not privileged, *see* Evid. Rule 503(b). The trial court's ruling was correct. The letter was addressed to the trial judge in the civil suit, with copies to other persons. The tape was made for the purpose of preparing the letter.

Deutsch also contends the admission of the letter and tape was error because the prosecutor, in closing argument, wove "sinister arguments" around them. We assume the claim alleges prosecutor misconduct. There was no misconduct. The contents of the letter could be considered as a self-serving exculpatory statement. If, as Deutsch contends (there are no transcript references and we have not looked up the arguments), the prosecutor characterized the letter as "a tissue of lies designed to dupe the attorney into helping [Deutsch] cover his criminal tracks," such was not misconduct but a permissible view of the evidence. *See State v. Venegas*, 96 N.M. 61, 628 P.2d 306 (1981).

TESTIMONY OF A QUESTIONED DOCUMENTS EXAMINER

This issue goes to the endorsements on the checks in Cause No. 37738. A questioned documents examiner, stipulated to be an expert witness, testified that two of the endorsements were "probably" signed by Deutsch, that three may have been signed by Deutsch, and that she could not make any identification of two endorsements. (This does not add up to the eight endorsements involved, but this is all the parties discuss.)

The examiner attributed her lack of certainty to the poor quality of the exemplars provided for purposes of comparison. Deutsch provided exemplars in October 1984, but they were insufficient for purposes of comparison. Deutsch provided additional exemplars in November 1984. The examiner testified the November

exemplars were worthless because they were an attempt by Deutsch to disguise his natural handwriting.

Deutsch contends the examiner's testimony concerning the November exemplars was improperly admitted, for two reasons.

(a) Qualifications of the Examiner

Deutsch asserts that the testimony about disguised exemplars was beyond the expertise of the examiner. He asserts the examiner's expertise was limited to handwriting comparison and no comparison was involved in connection with the November exemplars.

Before admitting the examiner's opinion as to the November exemplars, the trial court held a hearing where evidence was tendered. At the tender hearing, the examiner (1) described the exemplars as written with lack of skill and with obvious distortions so that the exemplars were not identifiable as having been written by the person who wrote the October exemplars; (2) explained the basis for her description, including the fantastic forms and distortions in the November exemplars; and (3) testified that attempts to disguise handwriting was within the scope of her expertise. The examiner testified that in her work she had encountered attempts to disguise many times and it was something she looked for. She agreed that if she could not recognize such attempts she would not be much of an expert. Her opinion, on the basis of her training and sixteen years of experience, was that the November exemplars were an attempt to disguise. On cross-examination she explained that her opinion was not based on any subjective mental state of Deutsch, but on the physical evidence (the exemplars).

The trial court did not abuse its discretion in admitting the examiner's opinion as expert testimony. *State v. Gilbert*, 100 N.M. 392, 671 P.2d 640 (1983); *see In Re Estate of Foster*, 102 N.M. 707, 699 P.2d 638 (Ct.App.1985).

(b) Character Testimony

NMSA 1978, Evid. Rule 404(a) (Repl.Pamp.1983) provides generally that evidence of a person's character is not admissible for the purpose of proving that he acted in conformity therewith. Evidence Rule 404(b) provides that evidence of other wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

Deutsch claims that the examiner's opinion that he attempted to disguise his handwriting in the November exemplars was inadmissible character evidence. We disagree.

Deutsch's attempt to disguise his handwriting in the November exemplars, at a time he was charged with multiple forgeries, was relevant evidence showing a consciousness of guilt. *State v. Vallejos*, 98 N.M. 798, 653 P.2d 174 (Ct.App.1982), and cases therein cited. Testimony as to the attempt to disguise was not admitted to prove that Deutsch acted in conformity to his character and was not inadmissible character evidence.

SUFFICIENCY OF THE EVIDENCE FOR THE FORGERY CONVICTIONS

There are eight forgery convictions. Deutsch attacks the sufficiency of the evidence as to each conviction. The attack has two parts.

(a) Deutsch asserts the evidence is insufficient to show that he endorsed the several checks or caused others to endorse the checks with his name. We disagree. The totality of the evidence and the legitimate inferences therefrom, including the testimony of the examiner, of Yudis, Deutsch's admission of a "mistake" and the circumstances in the handling and cashing of the checks, is substantial evidence that Deutsch either endorsed the checks or caused others to endorse his name.

(b) Deutsch asserts that even if he did endorse the checks, he signed only his own name. For all but one of the forgeries, we agree.

The jury was instructed, for each forgery charge, that there must have been a false endorsement. NMSA 1978, Section 30-16-10(A) applies to this case and defines "forgery" as "falsely making . . . any signature . . . ." Deutsch signed his own name. However, in count No. 7 (see the Haws loan transaction), a payee was "Harold Douglass Trustee." The endorsement of the name "Harold Douglass Trustee" was false. Deutsch's conviction of forgery in count No. 7 is affirmed. The signing of his own name on the other checks was not forgery, because it was not a false signature. *State v. Bibbins*, 66 N.M. 363, 348 P.2d 484 (1960).

The evidence that Deutsch's endorsement of the checks was without authorization is substantial. The validity of the forgery convictions, other than count No. 7, depends on whether Deutsch's signing of his own name, without authorization, amounts to forgery. Section 30-16-10(A) does not define forgery in terms of lack of authorization. Compare the wording of the statute involved in *People v. Young*, 19 Ill.App.3d 455, 311 N.E.2d 609 (1974).

The state asserts that a genuine signature, without authorization, is forgery in New Mexico. It cites *State v. Lopez*, 81 N.M. 107, 464 P.2d 23 (Ct.App.1969), but that case does not support the state. *Lopez* involved the signing of the name of the payee, falsely, when Lopez was not the payee.

The State asserts that a genuine signature, without authorization, *should* be forgery in New Mexico. It cites *People v. Susalla*, 392 Mich. 387, 220 N.W.2d 405 (1974). *Susalla* does support the state; the court interpreted the Michigan forgery statute to include a genuine signature without authorization. In so holding, the Michigan court rejected the common law view that forgery did not include misrepresentation of agency. *See Gilbert v. United States*,

370 U.S. 650, 8 L.Ed.2d 750, 82 S.Ct. 1399 (1962). The power to define crimes is a legislative function in New Mexico. *State v. Allen*, 77 N.M. 433, 423 P.2d 867 (1967). This court lacks authority to trespass on the legislative power by adding a "without authorization" provision to the statutory definition of forgery. N.M. Const. art. III, § 1.

The state also cites two Texas cases. In *Moore v. State*, 666 S.W.2d 632 (Tex.App. 1st Dist.1984), the defendant signed his own name but pretended to be another person with the same name. This was forgery under the applicable Texas statute, which defined forgery to include the execution of a writing which purported to be the act of another who did not authorize the act. *Sales v. State*, 628 S.W.2d 796 (Tex.Cr.App.1982), involved the same statutory definition in Texas. The New Mexico statute does not contain such a definition.

R. Perkins & R. Boyce, *Criminal Law*, Chapter 4, Section 8 at 418 (3d ed.1982), points out that for forgery at common law, it is not sufficient for the writing to tell a lie, the writing itself must be a lie.

Where an agent, who has a general power to sign for his principal, indorses his principal's name on a negotiable instrument in fraudulent abuse of his power, this is not forgery because the indorsement is fully effective. An additional point is to be noted in cases in which one fraudulently purports to act as agent for another. If he has no power or authority to act in this capacity, the other will not be bound; but if the signature contains both names and shows that the signer was purporting to act as agent for the other, the writing is not a forgery.

R. Perkins & R. Boyce, *supra*, at 420 (footnotes omitted). *See* 4 *Wharton's Criminal Law*, § 497 (C. Torcia 14th ed.1981). As *Gilbert v. United States* points out, at common law, the endorsing of a bill of exchange under a false assumption of authority to endorse is not forgery because there is no false making.

In seven of the eight forgery convictions, Deutsch endorsed or caused his name to be endorsed to the check. This was not a false endorsement, only an endorsement without authorization. This was not forgery as defined in Section 30-16-10(A).

We reach this result without assistance from Deutsch, who cited no authority in support of the result reached. However, we cannot affirm on the basis of *In Re Adoption of Doe* because due process of law requires that there be sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. *State v. Sheets*, 96 N.M. 75, 628 P.2d 320 (Ct.App.1981). Seven of the eight forgery convictions must be reversed because the evidence of endorsement without authorization was insufficient to justify a rational trier of fact to find guilt. This is not a criticism of the jury. It asked: "Would the endorsement of a monetary instrument, signed with the true name of the endorser, but in direct contradiction to a court order forbidding the negotiation by said party, constitute forgery?" The question was not answered in the trial court. The answer, however, under Section 30-16-10(A), is "No."

The sentence in Cause No. 37206 is affirmed. The convictions and sentences in Cause No. 37738 for larceny, fraud and embezzlement are affirmed. The conviction and sentence for forgery, identified in count No. 7 of Cause No. 37738, are affirmed. The remaining seven forgery convictions are reversed.

IT IS SO ORDERED.

Joe W Wood
JOE W. WOOD, Judge

WE CONCUR:

William R Hendley
WILLIAM R. HENDLEY, Judge

Pamela B. Minzner
PAMELA B. MINZNER, Judge

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

FRANCIS THOMAS DEUTSCH,

Petitioner/Defendant,

v. No. **16226**

STATE OF NEW MEXICO,

Respondent/Plaintiff.

MOTION FOR REHEARING
OR
IN THE ALTERNATIVE
TO
STAY MANDATE

Submitted by: JOHN J. KELLEHER
c/o Franchini, Henderson
Wagner, & OLiver
(619) 260-4600 xt. 4380

GENE FRANCHINI
Franchini, Henderson,
Wagner, & Oliver
P.O. Box 1487
Albuquerque, NM 87103
(505) 242-6300

Attorneys for Plaintiff/Appellees: PAUL BARDACKE
Attorney General

Peter F. Kierst
Barbara F. Green
Asst. Attorneys General
P.O. Drawer 1508
Sante Fe, NM 87504
(505) 827-6081

C-2

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

FRANCIS THOMAS DEUTSCH,

Petitioner/Defendant,

v. No. 16226

STATE OF NEW MEXICO,

Respondent/Plaintiff.

Comes now the Petitioner, FRANCIS THOMAS DEUTSCH, by and through his attorneys, John J. Kelleher and Gene Franchini, and moves this court for an order as follows:

I. Granting Petitioner a rehearing, including oral argument, on his Petition for Certiorari filed with this court on January 20, 1936, or, in the alternative,

II. Staying the issuance of the Mandate of this Court and all proceedings in the courts below pending the filing of a Petition for Certiorari to the United States Supreme Court.

The basis for the motion for rehearing is as follows:

1. Petitioner is advised and believe that this Court has denied his Petition for Certiorari and is about to issue its Mandate to the courts below. Petitioner has never received a hearing, evidentiary or otherwise on several critical issues of fact and law raised in a timely fashion in this Court and in the courts below.

2. The issues raised concern violation by the Respondent of Petitioner's rights under the constitutions of the State of New Mexico and of the United States of America.

3. Petitioner's motions for redress from Respondent's misconduct were brought in good faith and raise not only matters of procedure, but go to the ultimate integrity of the finding of guilt in the trial below.

4. Petitioner maintains that he is innocent of the crimes of which he stands convicted and that there has been a substantial miscarriage of justice in his case.

5. Unless this Court grants Petitioner Writ of Certiorari, he will have no alternative but to engage in further litigation, the costs of which have already become nearly intolerable.

The basis for Petitioner's motion for a Stay of Mandate and of all proceedings in the courts below is as follows:

1. Under Rule 22 of the Rules of Practice before the United States Supreme Court, Petitioner has but sixty (60) days in which to seek review by writ of Certiorari.

2. Under Rule 27 of the Rules of Practice before the United States Supreme Court, this Court enjoys coextensive power with the United States Supreme Court to stay proceedings pending a petition for Certiorari to the United States Supreme Court.

3. Petitioner will, if his Petition for Rehearing is denied, bring a Petition for Certiorari before the United States Supreme Court.

4. Petitioner is financially distressed and his assistance in helping counsel prepare his Petition for Certiorari will enable Petitioner to avoid having to proceed *in forma pauperis*, thus becoming a financial burden to the public.

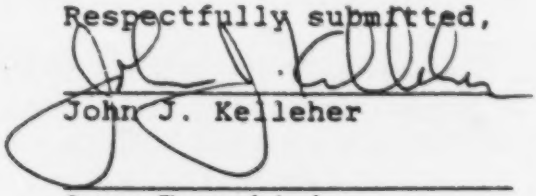
5. Petitioner stands convicted of no crime involving violence or other threat to the public peace or security, nor has he ever failed to appear or otherwise given any reason to consider Petitioner a flight risk. Petitioner's liberty greatly reduces the logistic demands

upon his counsel in preparing the many documents and pleadings necessary to vindicate his rights and secure his ultimate acquittal of all charges.

6. These motions are brought in good faith and not for the purpose of delaying or impeding the justice of this or any other Court.

WHEREFORE, Petitioner prays that this Court grant his motion for a rehearing, or, in the alternative, Stays all proceedings pending his Petition for Certiorari to the United States Supreme Court.

Respectfully submitted,



John J. Kelleher

Gene Franchini
P.O. Box 1487
Albuquerque, NM 87103
Attorneys for Petitioner

February 14, 1986

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Wednesday, March 5, 1986

NO. 16,226

FRANCIS THOMAS DEUTSCH,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

This matter coming on for consideration by the Court upon Motion of Petitioner for Rehearing or in the Alternative, to Stay the Mandate, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion of Petitioner for rehearing is hereby denied.

IT IS FURTHER ORDERED that the Motion of Petitioner to Stay the Mandate is hereby referred to the Court of Appeals for disposition.

ATTEST: A TRUE COPY

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

STATE OF NEW MEXICO

-vs-

FRANK DEUTSCH

Defendant

FILED IN MY OFFICE THIS
SEP 29 '83 PM
ROSELLA A. BUDRIS
DEPUTY CLERK

NO. 37206

PLEA AND DISPOSITION AGREEMENT

The State of New Mexico and the defendant hereby agree to the following disposition of this case:

Plea: The defendant agrees to plead (*guilty*) to the following offenses:

Criminal conspiracy to commit fraud in excess of $20,000, a third degree felony.

Terms: On the following understandings, terms and conditions:

1. That no more severe than the following disposition will be made of the charges: As provided by law; however, imposition of sentence is to be continued until 60 days after the completion of an audit of Guaranteed Equities, Inc., in conjunction with civil proceedings pending before Judge Lorenzo Garcia, in Santa Fe, No. 83-1651(C).

2. That the following charges will be dismissed, or if not yet filed, shall not be brought against the defendant: No additional criminal charges relating to any past criminal activity involving defendant, Continental Mortgage Exchange, Inc., Guaranteed Equities, Inc., or EFD Capital Group, Inc., or affiliated companies in the conduct of

those businesses in New Mexico, their assets, their liabilities and contracts.

3. That this agreement, unless rejected or withdrawn, serves to amend the complaint, indictment, or information to charge the offense to which the defendant pleads, without the filing of any additional pleading. If the plea is rejected or withdrawn, the original charges are automatically reinstated.

4. Unless this plea is rejected or withdrawn, that the defendant hereby gives up any and all motions, defenses, objections or requests which he has made or raised, or could assert hereafter, to be the court's entry of judgment against him and imposition of a sentence upon him consistent with this agreement.

5. That, if after reviewing this agreement and any presentence report the court concludes that any of its provisions are unacceptable, the court will allow the withdrawal of the plea, and this agreement shall be null and void. If the plea is withdrawn, neither the plea nor any statements arising out of the plea proceedings shall be admissible as evidence against the defendant in any criminal proceedings.

I have read and understand the above. I have discussed the case and my constitutional rights with my lawyer. I understand that by pleading (guilty) (no contest) I will be giving up my right to a trial by jury, to confront, cross-examine, and compel the attendance of witnesses, and my privilege against self-incrimination. I agree to enter my plea as indicated above on the terms and conditions set forth herein. I fully understand that if, as part of this agreement, I am granted probation, a suspended sentence or a deferred sentence

by the court, the terms and conditions thereof are subject to modification in the event that I violate any of the terms or conditions imposed.

9/28/83 /s/
DATE DEFENDANT

I have discussed this case with my client in detail and advised him of his constitutional rights and all possible defenses. I believe that the plea and disposition set forth herein are appropriate under the facts of this case. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

9/28/83 /s/
DATE DEFENSE COUNSEL

I have reviewed this matter and concur that the plea and disposition set forth herein are appropriate and are in the interests of justice.

9/29/83 /s/
DATE PROSECUTOR

Approved:

/s/
MAGISTRATE OR DISTRICT JUDGE

APPENDIX E

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

ENDORSED
FILED IN MY OFFICE THIS
JUN 2 - 1981
Elaine E. Young
CLERK DISTRICT COURT

STATE OF NEW MEXICO,
Plaintiff,

vs.

NO. 37206

FRANK DEUTSCH,
Defendant.

NOTICE OF STATE'S INTENTION TO RECOMMEND ALTERATION OF BASIC SENTENCE BY REASON OF AGGRAVATING CIRCUMSTANCES.

COMES NOW the State of New Mexico and hereby notifies the Court and the defendant that it intends to recommend alteration of the defendant's basic sentence by reason of aggravating circumstances. Pursuant to Section 31-18-15.1, NMSA 1978 as amended, the State will submit evidence to the Court at the sentencing hearing in support of its contention that the basic sentence for the third degree felony to which the defendant has pleaded guilty should be increased by one-third.

Respectfully submitted,

PAUL BARDACKE
Attorney General

STEPHEN WESTHEIMER
Assistant Attorney General

FRED CHRIS SMITH
Assistant Attorney General

P.O. Drawer 1508
Santa Fe, New Mexico 87504
505 827-6000

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

ENDORSED
FILED IN MY OFFICE THIS
AUG 27 1984
Elsie E. Young
CLERK DISTRICT COURT

No. CR 37206

STATE OF NEW MEXICO,

Plaintiff,

vs.

FRANCIS (FRANK) THOMAS DEUTSCH, et al.,

Defendants.

MOTION TO ENFORCE PLEA AGREEMENT

The Defendant respectfully requests that the Court enforce the plea agreement entered into between the parties attached hereto as Exhibit A.

As grounds for this motion, counsel for the Defendant states:

1. On September 29, 1983, the parties entered into a plea agreement memorialized by the memorandum attached hereto as Exhibit A.

2. The Defendant has fully complied and performed his obligations under the plea agreement or to the extent that the Defendant was unable to perform any part of the agreement it was due to the efforts of the State.

WHEREFORE, the Defendant having fully performed the plea agreement herein, respectfully requests that the Court order the State of New Mexico to comply with its provisions.

THIS MOTION IS SET
FOR HEARING ON
9-10, 84 AT 1:30PM.
JUDGE

Respectfully submitted,

CHRIS KEY
Attorney for Defendant
211 Twelfth Street N. W.
Albuquerque, New Mexico 87102
(505) 242-9097

I hereby certify that a true and correct copy of the foregoing was mailed to opposing counsel of record this ____ day of August, 1984.

Chris Key

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

FILED IN MY OFFICE THIS
JAN 30 1985

STATE OF NEW MEXICO,

Plaintiff,

vs.

No. CR 37206

FRANCIS (FRANK) THOMAS DEUTSCH,

Defendant.

JUDGMENT, SENTENCE AND COMMITMENT

THIS MATTER having come before the Court on January 30, 1985. State being represented by Attorney General Paul Bardacke and by Assistant Attorney General John G. McKenzie, and the Defendant appearing personally and by his attorneys, Gene Franchini and John Kelleher. The Defendant having plead guilty to one County of conspiracy to commit fraud in excess of $20,000, contrary to Sections 30-16-6 and 30-20-2, NMSA 1978, as amended, a third degree felony on September 29, 1983, pursuant to a Criminal Information filed on September 28, 1983, and a hearing having been conducted on sentencing on October 30, 1984, the Defendant having been present both personally and by his attorneys, Gene Franchini and Manny Aragon, and a Judgment of Guilty having been signed by this Court and filed.

The Defendant is hereby ADJUDGED GUILTY AND CONVICTED of the crime of conspiracy to commit fraud in excess of $20,000 and is sentenced to be imprisoned by the New Mexico Department of Corrections for a term of three (3) years, following which time the Defendant shall serve a two (2) year mandatory statutory parole period.

This sentence shall be served and shall run consecutively and not concurrently to the term of imprisonment imposed upon the Defendant in Bernalillo County District Court Cause No. CR 37738.

THEREFORE, the Defendant is remanded to the custody of the New Mexico Department of Corrections to serve the term of imprisonment of three (3) years as stated herein. The Defendant shall be entitled to 12 days of pretrial confinement.

PHILIP R. ASHBY
District Judge

Approved as to form:

JOHN G. McKENZIE
Assistant Attorney General

GENE FRANCHINI
Attorney for the Defendant

E-6

FILED IN MY OFFICE THIS

FEB 01 1985

CLERK DISTRICT COURT

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CR-37206
No. CR-37738

STATE OF NEW MEXICO,

Plaintiff,

vs.

FRANCIS THOMAS DEUTSCH,
a/k/a FRANK DEUTSCH,

Defendant.

THIS MOTION IS SET FOR HEARING
ON 2-4 1985 AT 9:00
BEFORE JUDGE Ashley
The party filing this motion is responsible for serving all parties entitled to notice.
FEB 01 1985

AMENDED MOTION FOR RECONSIDERATION OF SENTENCE

COMES NOW the Defendant, Frank Deutsch, by and through his counsel of record, FRANCHINI, HENDERSON, WAGNER & OLIVER (Gene E. Franchini), and amends its original Motion filed January 31, 1985 as follows:

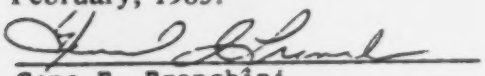
With regard to Paragraph 1: . . . That in the alternative Defendant moves the Court to declare that its refusal to enforce the plea and disposition agreement entered into by the State and this Defendant is an appealable issue. That the Court set an appeal bond on this matter by continuing the bond filed by the Defendant in Cause Number 37738 and apply it to this Cause Number 37206.

FRANCHINI, HENDERSON,
WAGNER & OLIVER

BY: _____

Gene E. Franchini
Attorneys for Defendant
320 Gold S.W., Suite 816
Albuquerque, NM 87102
505/242-6300

I hereby certify that I have hand-delivered a true and correct copy of the foregoing to opposing counsel of record, this 1 day of February, 1985.



Gene E. Franchini

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CR 37738 and CR 37206

STATE OF NEW MEXICO,

Plaintiff,

vs.

FRANCIS THOMAS DEUTSCH
a/k/a FRANK DEUTSCH,

Defendant.

ENDORSED
FILED IN MY OFFICE THIS
FEB 06 1985
Eloise E. Young
CLERK DISTRICT COURT

ORDER

THIS MATTER coming on before the Court on this 6th day of February, 1985, the Court hearing arguments of counsel and being otherwise fully advised,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the Motion for Reconsideration of Sentence be and the same is hereby denied.

2. That the Court declares that its refusal to enforce the Plea and Disposition Agreement in cause #CR 37206 is an appealable issue;

3. That the bond set and posted by the Defendant in cause #CR 37738 in the sum of $100,000.00 be and the same is continued during the appeal of this matter and is hereby set as an appeal bond in this cause and in cause #CR 37206.

4. That the Defendant be released pending appeal of these causes together with the attached conditions of release.

PHILIP R. ASHBY
DISTRICT JUDGE

E-9

ENDORSED
FILED IN MY OFFICE THIS
FEB 14 1986
Elaine E. Young
CLERK DISTRICT COURT

SECOND JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF BERNALILLO

No. CR 37206/CR 37738

STATE OF NEW MEXICO,

Plaintiff,

vs.

FRANCIS THOMAS DEUTSCH,
A/K/A FRANK DEUTSCH,

Defendant.

THIS MOTION IS SET FOR HEARING
ON 2/24 19 86 AT 1:30
BEFORE JUDGE PHILIP R. ASHBY
The party filing the motion is responsible for serving all parties entitled to notice.
Joyce A. Franco
Clerk
FEB 14 1986
Date

MOTION FOR RECONSIDERATION OF SENTENCE

COMES NOW the Defendant, Frank Deutsch, by and through FRANCHINI, HENDERSON, WAGNER & OLIVER (Gene E. Franchini), and JOHN KELLEHER, his counsel of record, and moves the Court to reconsider the sentences imposed in these cases, and as grounds therefor, states:

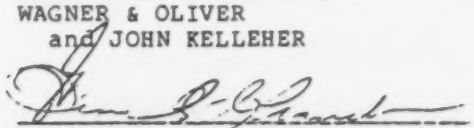
1. As to Cause Number 37738, Defendant moves the Court to reconsider its nine year sentence because the Court of Appeals has reversed and dismissed seven forgery convictions against the Defendant. Said Court has not granted a new trial as to the other convictions of fraud, larceny and embezzlement, even though all the evidence as to the reversed forgery convictions was heard by and submitted to the jury to the prejudice of the Defendant. Defendant therefore requests that this Court take these factors into consideration and reconsider and amend its prior sentence.

2. As to Cause Number 37206, Defendant moves the Court to modify its three year sentence imposed upon the Defendant and either suspend or defer the imposition of that sentence and enforce the plea and disposition agreement entered into by the State and

this Defendant. In the alternative, Defendant moves the Court to run any previously imposed sentence concurrently with any sentence imposed in Cause Number 37738.

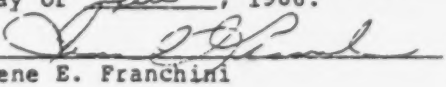
3. Defendant further moves this Court to suspend in whole or in part the total sentence previously imposed by the Court for the reasons set forth above, for the reason that the Defendant has no prior record of criminal activity, and for the reason that Defendant is willing to make restitution to any person who was financially damaged as a result of the subject matter of these causes of action.

FRANCHINI, HENDERSON,
WAGNER & OLIVER
and JOHN KELLEHER



BY: Gene E. Franchini
Attorneys for Defendant
P. O. Box 25167
707 Broadway NE, Suite 100
Albuquerque, New Mexico 87125-5167
505/242-6300

I hereby certify that a true copy of the foregoing was forwarded to counsel of record on the 14 day of Feb, 1986.



Gene E. Franchini

APPENDIX F

F-1

ENDORSED
FILED IN MY OFFICE THIS
JAN 10 1985
Felicia G. Young
CLERK DISTRICT COURT

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff,
v.
FRANCIS DEUTSCH,
Defendant.

No. CR 37738

MOTION FOR POST-TRIAL HEARING ON TAINT

COMES NOW the defendant, by and through counsel, and moves this Court for an order granting an evidentiary hearing concerning:

1. The circumstances surrounding defendant's cooperation with the investigation culminating in his indictment and;

2. Harold Douglass' interception and opening of defendant's personal mail and the uses made by the government of the fruits of this criminal and warrantless search.

In the event a hearing is granted, at the conclusion thereof the defendant will further move the court suppress all testimony and exhibits derived from such unlawful search and seizure, to set aside the jury verdict, and dismiss the indictment herein.

This motion is based upon the accompanying Affidavit Of John J. Kelleher, Memorandum Of Law, and the testimony and exhibits received during trial of this case.

THIS MOTION ... ON ... 19 ... AT ... BEFORE HONORABLE ...
The party filing this motion is responsible for serving all parties entitled to notice.
Clerk Date

Gene Franchini

John J. Kelleher
320 Gold Avenue, S.W.
Albuquerque, New Mexico 87102
(619) 260-4600 xt 4380

January 8, 1985

F-2

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

FILED IN MY OFFICE THIS
JAN 10 1985
CLERK DISTRICT COURT

STATE OF NEW MEXICO, Plaintiff, v. FRANCIS DEUTSCH, Defendant.	No. CR 37738 AFFIDAVIT OF JOHN J. KELLEHER

JOHN J. KELLEHER, being duly sworn, deposes and says:

1. I represent Francis Deutsch, defendant in the captioned case, and submit this affidavit in support of defendant's motion for a post trial evidentiary hearing. The following facts are sworn to as of my own knowledge except those stated to be on information and belief. As to matters stated to be on information and belief, I believe the facts stated to be true.

2. Defendant was convicted after a twelve day jury trial of fifteen counts of the seventeen counts charged in the indictment. Count Seventeen of the indictment (Racketeering) was dismissed by nolle prosequi on the first day of trial. Count Sixteen (Solicitation) was dismissed at the conclusion of the government's case.

3. On the first day of trial, Tuesday, December 4, 1984, defense counsel requested access to tape recordings made of telephone conversations between government agents and various witnesses, including the defendant. Such recordings had been ordered to be provided pursuant to pre-trial discovery, however, none had been delivered. There is an unresolved issue of fact as to whether counsel for the State had previously made access to the tape recorded conversations available to other counsel for the defendant. Defendant's trial counsel first became aware of the existence

of such recordings when reading agent's reports received in discovery during the week immediately before commencement of the trial and reviewed over the weekend of December 1st.

4. On the second trial day, Wednesday, December 5, 1984, counsel for the state produced one reel-to-reel and three cassette tapes advising defense counsel that these tapes were available for review in the office of the Attorney General during business hours. On information and belief, on the following day, Thursday, December 6, 1984, Ms. Dal Santo, an associated attorney working with defense counsel, appeared at the office of the Attorney General and was provided with not four, but fourteen tapes of recorded conversations of government agents, the defendant and others. Unable to review the tapes in their entirety under the time pressures of trial, Ms. Dal Santo catalogued the tapes, took samplings and reported back to affiant.

5. Defense counsels' motion for a mistrial based upon late discovery of the tapes was denied without hearing, leaving unresolved the issue of whether the untimely discovery of the tapes was the result of prosecutorial misconduct or defense counsels' failure to pursue diligently the discovery ordered.

6. On Friday, December 7, 1984, affiant commenced listening to the many hours of discovered tapes. In the course of this review, affiant first discovered impartial support for defendant's claim that Government investigators had given his repeated assurance that their investigation was not targeted on him, thereby lulling defendant into further cooperation with the investigation which resulted in his indictment. Further, the tapes provided impartial evidence that Harold Douglass, the court appointed "Trustee of the Cash" of Guaranteed Equities, had intercepted and opened personal mail of the defendant and other persons employed at Guaranteed Equities. This support was found in a recorded conversation between Leslie Malek, a State's witness before the Grand Jury and at trial, and Ross Becker an investigator for the Attorney General's Office. In a telephone

conversation being secretly recorded by Becker, Ms. Malek related that she had been directed by Douglass to open all mail, even the personal mail, of the defendant.

7. Although Harold Douglass denied any such order or activity when recalled for additional cross-examination after this item became known to the defense, Leslie Malek in her trial testimony confirmed that Douglass had ordered her to open defendant's personal mail. Alan Wedvik, a defense witness, testified that to his knowledge Deutsch's and his own personal mail had been received from Douglass in an opened condition. Wedvik even recalled receiving an item of social mail from Douglass already opened. Deutsch too, testified that he received personal mail, including confidential mail addressed to him from attorneys regarding unrelated matters, in an opened condition during the trusteeship of Harold Douglass. At no time during his testimony did Douglass claim that he opened defendant's personal mail as a matter of right under any court order. Although the proof was overwhelmingly to the contrary, Douglass simply denied such activity.

8. It is undisputed that Harold Douglass was reporting to the Attorney General's Office during the period during which he is alleged to have intercepted and opened personal mail. Douglass himself testified at trial that he sought legal counsel concerning his authority to open mail from Ms. Mary McInerny, then an Assistant Attorney General.

9. At defense counsels' motion, this court took judicial notice of Title 18 United States Code Sections 1701 & 1702, each of which makes unlawful interception of personal mail a federal crime. It is indisputable that such misconduct, if proved, would constitute a violation of the Due Process and Search and Seizure provisions of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

10. Defense counsel made a timely motion for a mistrial, suppression of the evidence and dismissal of the indictment based

upon the foregoing facts. Agent reports were submitted as exhibits indicating that during the time of Douglass' trusteeship, a "confidential informant" was feeding government agents personal information about the defendant of a type which appears to have been gleaned from defendant's private mail. Defendant's American Express card number and usage, travel agency records, and telephone tolls were all "confidentially" provided to government investigators. Other reports indicated agent contact with persons involved in unrelated law suits and business with defendant. On information and belief, at this same period of time, Douglass was intercepting defendant's personal correspondence from attorneys, travel agents, the telephone company and American Express and delivering it to defendant in an opened condition. It is defense counsels' understanding that this Court's denial, without evidentiary hearing, of defendant's mid-trial motion to suppress assumed the truth of the allegations that Douglass violated federal criminal law and the United States Constitution and that Douglass was the "confidential informant" who so thoroughly disclosed defendant's private affairs to other government investigators. The Court held that since no specific item of the State's evidence could *then* be traced directly to Douglass' misconduct, the motion must fail. For the reasons set forth in the accompanying Memorandum of Law, it is counsels' position that the Court's ruling misconstrues the burden of proof once a prima facie showing of an unlawful search by a government agent has been made.

11. The trial motion amounted to a reiteration of a pre-trial motion to suppress all defendant's statements and fruits thereof adding an additional basis. The pre-trial motion was based on defendant's contention that his cooperation with the government investigation culminating in the instant indictment was fraudulently procured by promises that he was not under investigation. This motion too was denied because, pre-trial, defendant was unable to specify which of the many items of evidence provided by him would be offered by the State in its case against him. There was no statement or other evidence which was particularly incriminating

in and of itself. The tape recorded conversations of the defendant with government agents lend powerful additional factual support to defendant's contentions in this regard. Unfortunately, this evidence was not known to the defense at the time of its pre-trial motion.

12. After the Court's denial of the mid-trial motion to suppress, a defense case was presented which, in relevant part, is summarized above. One further item, however, bears analysis. After the defendant testified on direct, he was subject to searching cross-examination by State's counsel. Among the areas covered in this cross-examination was a loan received by defendant from an entity identified as "Penvest," a New York pension trust management company. The details of this loan were confidential and not part of the books and records of Guaranteed Equities. On information and belief, this loan had been the subject of attorney-client correspondence addressed personally to defendant at his Guaranteed Equities office during the time Douglass was intercepting and opening defendant's personal mail. It is defendant's position that even assuming he has the burden of showing that the fruits of Douglass' misbehavior were harvested by the prosecution, this burden has been met. The State's use at trial of the information regarding Penvest establishes a direct link between Douglass' criminal interception and opening of defendant's mail and the evidence used in the State's case at trial.

13. For the foregoing reasons, defendant respectfully requests that this court conduct a full hearing into the circumstances surrounding defendant's cooperation with the government's investigation, Harold Douglass' interception of defendant's personal mail, the identity of the government's "confidential informants," and the State's use of the fruits of these activities in presentation of the case against defendant to Grand Jury and trial jury.

John J. Kelleher

Sworn to Before Me
This 8th Day of January, 1985
Kyle C. Poston
Notary Public

KYLE C. POSTON

F-7

ENDORSED
FILED IN MY OFFICE THIS
JAN 10 1985
Elsie G. Young
CLERK DISTRICT COURT

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff,
v.
FRANCIS DEUTSCH,
Defendant.

No. CR 37738

MEMORANDUM OF LAW

INTRODUCTION

This Memorandum of Law and accompanying Affidavit of John J. Kelleher are submitted in support of defendant's motion for a post-trial hearing concerning: 1. The circumstances surrounding defendant's cooperation with the government investigation which culminated in the instant indictment; and 2. The interception of defendant's personal mail by government agents and use of the fruits of this warrantless search in the investigation and prosecution of the case against him. The facts upon which defendant's argument is based are more fully set forth in the accompanying Affidavit of John J. Kelleher.

ARGUMENT

I.

HAVING MADE A PRIMA FACIE SHOWING THAT DOUGLASS MADE AN ILLEGAL SEARCH OF HIS PERSONAL MAIL, THE DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING AT WHICH THE BURDEN IS UPON THE STATE TO PROVE THAT ITS CASE IS UNTAINTED.

The Fourth Amendment provides "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated. . . ." It cannot be disputed that defendant's personal mail constitutes "papers" and, as such, is subject to full Constitutional protection. The issue raised by this court's mid-trial ruling is, having shown an unlawful search and apparent use of the fruits of the search by government investigators, is the defendant entitled to an evidentiary hearing? In *Nardone v. United States*, 308 U.S. 338 (1939), Justice Frankfurter addressed this precise issue in reversing a conviction for tax fraud. In *Nardone*, government agents had used an illegal wire tap in investigating the defendant's activities. As is the case here, the method used violated specific federal statute and the Fourth Amendment. The court held:

> The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established -- as was plainly done here -- the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity for the *Government to convice the trial court* that its proof had an independent origin. 308 U.S. 338, 342. (Emphasis supplied.)

Three witnesses testified at trial that Douglass, a government employee, opened or caused to be opened the personal mail of defendant, Francis Deutsch. Evidence was adduced tending to show that Douglass passed this information on to criminal investigators and that they, in turn, made use of Douglass' information in sifting through the defendant's affairs for evidence to present to the Grand Jury. Additionally, defendant has shown that the State made use at trial of confidential information which could only have been known through Douglass' opening of attorney mail addressed to defendant, not Guaranteed Equities. Having made such a strong *prima facie* showing of criminal misconduct by a government agent in violation of the defendant's Fourth Amendment rights, *Nardone* dictates that a hearing must be held. At such hearing the State must demonstrate that each item of evidence introduced at trial was derived independent of the criminal activities of Harold Douglass. See also, *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977).

II.

DEFENDANT IS ENTITLED TO A HEARING CONCERNING EVIDENCE OBTAINED FROM HIM BY DELIBERATE DECEPTION.

In his pre-trial motions defendant requested this court to suppress all his statements and other evidence derived or obtained from him because his voluntary and extensive cooperation was procured by conscious government deception. Defendant insisted and continues to urge that he was the victim of a pattern of false assurances that he was not the target of any investigation and, later, that his guilty plea to a related criminal information would "close the book" on the government's investigation. This allegation received dramatic factual support from the tape recorded conversations of defendant and government agents -- tape recordings the existence of which was unknown to the defense until the trial had actually started. Defendant's case is in many respects similar to *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977). In *Tweel*

the Internal Revenue Service failed to apprise the defendant of the criminal nature of its investigation and through this conscious deception obtained copies of books and records which were subsequently used in Tweel's prosecution for tax evasion. In reversing Tweel's conviction, the Fifth Circuit remanded the case for a taint hearing agreeing with the appellant that the "microfilming of appellant's records constituted an illegal search in violation of the Fourth Amendment because appellant's consent was obtained through deception." 550 F.2d 297, 298.

The court also observed:

> From the facts we find that the agent's failure to apprise the appellant of the obvious criminal nature of this investigation was a sneaky deliberate deception by the agent . . . and a flagrant disregard for the appellant's rights. The silent misrepresentation was both intentionally misleading and material. 550 F.2d 297, 299.

It is defendant's contention that the tape recorded conversations first disclosed during trial adequately demonstrate that government investigators were both "sneaky and deliberate." The defendant cooperated with government investigators until almost the eve of his indictment. Like Tweel, defendant voluntarily provided records which formed the backbone of the prosecution against him. Many records were even copied at defendant's expense. Since new evidence of the government's deception was first obtained mid-trial, this court must grant a hearing to give defendant an opportunity to develop facts demonstrating his assertion that his cooperation was fraudulently procured tainting all the evidence thereby obtained. *See also, United States v. Lipshitz*, 132 F.Supp. 519 (E.D.N.Y. 1955).

III.

DOUGLASS' CRIMINAL INTERCEPTION OF DEFENDANT'S MAIL VIOLATES DUE PROCESS AND CAN ONLY BE REMEDIED BY SETTING ASIDE THE JURY'S VERDICT AND DISMISSAL OF THE INDICTMENT.

The testimony received at trial can leave little doubt that Harold Douglass intentionally intercepted and opened the defendant's personal mail. He did so without probable cause, warrant or claim of right. Although Douglass denied opening personal mail, three witness [*sic*] testified to the contrary and one, Leslie Malek, had previously so advised government investigators in a recorded telephone conversation. These facts clearly establish a *prima facie* case that Douglass violated federal statutes relating to interference with the mail (Title 18 U.S.C. Secs. 1701 & 1702), Conspiracy (Title 18 U.S.C. Sec. 371), and Aiding & Abetting (18 U.S.C. Sec. 2). They would also be sufficient, were Douglass so charged, to find him guilty of perjury in his testimony against defendant.

The United States Supreme Court has commented frequently on the duty of the courts to insure that the methods used by the government in detecting and prosecuting crime do not themselves stray into violation of the law. In *Rochin v. California*, 342 U.S. 165 (1952), Justice Frankfurter provided a Due Process rationale for so policing the police as follows:

> Regard for the requirements of Due Process Clause "inescapably imposes on this Court an exercise of judgment upon the whole course of proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses." The standards of justice are not authoritatively formulated

> anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked fundamental", or are "implicit in the concept of ordered liberty." 342 U.S. 165, 169.

Rochin involved evidence obtained by the involuntary pumping of the defendant's stomach and was followed in *Jackson v. Denno*, 378 U.S. 368 (1964), where the Supreme Court reiterated a broad Due Process basis for invocation of the exclusionary rule in suppressing a confession:

> . . . because of "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." 378 U.S. 368, 386.

Federal Circuit Courts have similarly relied on Due Process reasoning when government misconduct is involved in the investigation or prosecution of a criminal case. *See, i.e., United States v. Spivey*, 508 F.2d 146 (10th Cir., 1975), cert. denied, 421 U.S. 949 (1975), *United States v. DeSapio*, 435 F.2d 272 (2d Cir. 1970).

Defendant's argument here is similar in some respects to that made in *United States v. Payner*, 434 F.Supp. 113 (N.D. Ohio E.D. 1977), where District Judge Manos was asked to suppress evidence obtained by a criminal breaking and entering into the briefcase of a bank official who was not a defendant in the case. Because the defendant in *Payner* did not have standing to raise the Fourth Amendment violation (he had no interest in the apartment entered or briefcase broken into), he relied entirely on Due Process grounds in seeking to suppress photographic copies of records

found in the briefcase and proposed to be used against him. Payner argued that the the [*sic*] criminal conduct of government agents was so outrageous that he should be permitted to raise it as a violation of Due Process. Judge Manos carefully reviewed the facts and controlling authority finding that the government "was an active participant in . . . admittedly criminal conduct. . . .", 434 F.Supp. 113, 121. The court held:

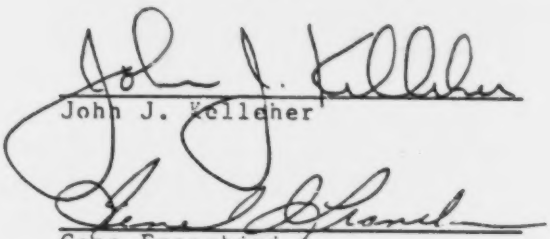
> The Court finds that the illegal conduct of the government officials involved in this case compels the conclusion that they knowingly and purposefully obtained the briefcase materials with *bad faith hostility* toward the strictures imposed on their activities by the Constitution.
>
> The activities of the Government agents . . . were outrageous. They plotted, schemed and ultimately acted in contravention of the United States Constitution and the laws of Florida, knowing that their conduct was illegal. It is imperative to signal to all likeminded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country and that such acts shall never be allowed to bear fruit. 434 F.Supp. 113, 130-131.

It is defendant's position that the facts already adduced at trial demonstrate that Harold Douglass, a government agent, acted in conscious disregard for defendant's constitutional rights and in direct violation of federal statutes expressly designed to protect those rights. Further this Court could find that Douglass' dishonesty when testifying concerning this misconduct demonstrates precisely that callous disregard for the Constitution and law of the land which must not be permitted to go unpunished. Douglass testimony and all evidence derived from his activities should be suppressed.

CONCLUSION

WHEREFORE, this court should grant the defendant's motion in all respects.

Respectfully Submitted,



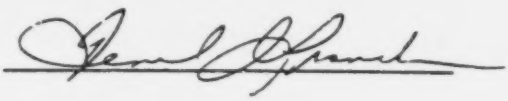
John J. Kelleher

Gene Franchini

Attorneys for Defendant
320 Gold Avenue, S.W.
Albuquerque, NM 87102

January 8, 1985

I HEREBY CERTIFY that true copies of the foregoing Motion for Post-Trial Hearing on Taint, Affidavit of John J. Kelleher, and Memorandum of Law were forwarded to John G. McKenzie, Assistant Attorney General, Post Office Drawer 1508, Sante Fe, New Mexico, 87504 - 1508, this 10 day of January, 1985.



SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

FILED IN MY OFFICE THIS
JAN 30 1985
[illegible]
CLERK DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

vs.

No. CR 37738

FRANCIS THOMAS DEUTSCH,
a/k/a FRANK DEUTSCH,

Defendant.

ORDER

THIS MATTER having come before the Court upon the motion of the Defendant for a post-trial evidentiary hearing on taint on evidence used by the prosecution, and the Defendant appearing both personally and by his attorneys, Gene Franchini and John Kelleher, and the State appearing by Attorney General Paul Bardacke and Assistant Attorney General, and the Court being fully advised in the premises of the motion;

IT IS HEREBY ORDERED that the Motion be denied.

IT IS FURTHER ORDERED that the State shall produce to the Court for inclusion in the Record Proper originals or copies of those tapes containing conversations of the Defendant as alleged by the Defendant and in the possession of the State.

[signature]
District Judge

Approved as to form:

[signature]
JOHN G. McKENZIE
Assistant Attorney General

[signature]
GENE FRANCHINI
Attorney for the Defendant

APPENDIX G

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

ENDORSED
FILED IN MY OFFICE THIS
OCT 1 0 1984
Elaine E. Young
CLERK DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

v.

No. CR 37738

FRANCIS DEUTSCH, a/k/a
FRANK DEUTSCH,

Defendant.

MOTION TO PRECLUDE TESTIMONY AND STRIKE COUNTS 4, 5, 16 AND 17 OF THE GRAND JURY INDICTMENT

COMES NOW the Defendant, by and through counsel, and moves this Court to preclude the testimony of Richard Grodner and strike Counts 4, 5, 16 and 17 of the indictment in this matter, and as grounds therefor, states:

That at all times relevant to the indictment in the above matter, Richard Grodner was an attorney employed by the Defendant, and there was, therefore, an existing attorney/client relationship.

It is believed that Counts 4, 5, 16 and 17 are based on Mr. Grodner's testimony and such testimony should not be used to make any element of those Counts. Furthermore, upon information and belief the entire indictment may be tainted by such testimony and the Defendant reserves the right to move to dismiss

the entire indictment at a later date, after review of the Grand Jury testimony.

DIANE DAL SANTO
T. B. Keleher & Associates
Post Office Box 1246
Albuquerque, New Mexico 87103
(505) 265-6441

I HEREBY CERTIFY that a true copy of the foregoing Motion To Preclude Testimony and Strike Counts 4, 5, 16, and 17 of the Grand Jury Indictment was forwarded to John G. McKenzie, Assistant Attorney General, Post Office Drawer 1508, Santa Fe, New Mexico, 87504-1508, this 10th day of October, 1984.

APPENDIX H

IN THE SUPREME COURT
FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff/Respondent,

vs. No. _____

FRANCIS THOMAS DEUTSCH,

Defendant/Petitioner,

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS
ON
CRIMINAL APPEAL FROM THE DISTRICT COURT OF THE
SECOND JUDICIAL DISTRICT
BERNALILLO COUNTY, NEW MEXICO

Submitted by: JOHN J. KELEHER
c/o FRANCHINI, HENDERSON
WAGNER & OLIVER
(619) 260-4600 ext. 4380

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Attorneys for Plaintiff/Respondent:
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Barbara F. Green
Assistant Attorneys General
P. O. Drawer 1508
Santa Fe, New Mexico 87504
(505) 827-6081

STATEMENT OF QUESTIONS PRESENTED

QUESTION I

DID THE COURT OF APPEALS ERR IN DENYING PETITIONER'S APPEAL BASED ON LATE AND INCOMPLETE DISCOVERY IN CAUSE NUMBER CR-37738?

QUESTION II

DID THE COURT OF APPEALS ERR IN DENYING PETITIONER'S APPEAL BASED ON TAINT IN CAUSE NUMBER CR-37738?

QUESTION III

DID THE COURT OF APPEALS ERR IN DENYING PETITIONER'S APPEAL BASED UPON THE USE BEFORE THE GRAND JURY AND AT TRIAL OF THE TESTIMONY OF PETITIONER'S ATTORNEYS IN CAUSE NUMBER CR-37738?

QUESTION IV

DID THE COURT OF APPEALS ERR IN DENYING PETITIONER'S APPEAL BASED UPON THE IMPROPER USE OF THE TESTIMONY OF AN EXAMINER OF QUESTIONED DOCUMENTS IN CAUSE NUMBER CR-37738?

QUESTION V

DID THE COURT OF APPEALS ERR IN SUSTAINING THE DISTRICT COURT'S REFUSAL TO MODIFY SENTENCE OR GRANT OTHER RELIEF FROM THE PLEA AND DISPOSITION AGREEMENT IN CAUSE NUMBER CR-37206?

QUESTION VI

DID THE COURT OF APPEALS ERR IN FAILING TO REVERSE OR REMAND ALL REMAINING CHARGES IN LIGHT OF ITS REVERSAL OF THE SEVEN COUNTS OF FORGERY IN CAUSE NUMBER CR-37738?

This petition seeks review of the Court of Appeal's decision in *State of New Mexico v. Francis Thomas Deutsch*, No. 8355, filed December 31, 1985. A copy of the opinion of the Court of Appeals is attached as Appendix A.

SUMMARY OF FACTS MATERIAL TO QUESTIONS PRESENTED

Facts in Cause Number CR-37206:

All charges against Petitioner/Defendant Deutsch (Petitioner) arise out of his ownership of a New Mexico mortgage brokering business commencing in the fall of 1982. At the time Petitioner purchased the business, it and its principals were already under criminal investigation. Petitioner cooperated with this investigation, permitting Attorney General's investigators free access to the books and records of the business.

By late summer 1983, Petitioner became suspicious that he himself was the target of a criminal investigation. Finally, in the last week of September, 1983, he was summoned to the Attorney General's office and told that a forty-five count indictment had been prepared charging him with fraud in connection with certain business practices inherited from those who previously operated the business. Petitioner was given two days to consider whether to face this indictment or agree to a plea and disposition. In that period an agreement was reached and, on September 29, 1983, Petitioner entered a plea of guilty to Information Number CR-37206 charging one count of Conspiracy to Commit Fraud in Excess of $20,000 in violation of Section 30-16-6 and 30-28-2(B), NMSA 1978, as amended, a third degree felony. A signed memorandum of the terms of this agreement was accepted and sealed by District Judge Patricia Madrid on the same date. Subsequently, Judge Madrid recused herself from the case and District Judge Philip R. Ashby was assigned to continue the matter.

On November 1, 1984, on Petitioner's motion, a hearing was held before Judge Ashby concerning the State's intentional prevention of Petitioner's performance of the terms of the plea and disposition agreement. At this hearing Petitioner requested a finding that the State, not he, had caused investor losses by, among other things, defaming Petitioner and refusing to permit potential salvage lenders to have access to company records controlled by the State. Petitioner did not seek to withdraw his plea. Rather, he requested that the court accept the agreement's principal provision from Petitioner's perspective, to wit, that Petitioner be granted either a deferred or suspended sentence in Cause Number 37206. The State cross-examined Petitioner and his two other witnesses at this hearing, but offered no evidence.

Judge Ashby made no ruling at the conclusion of the November 1st hearing. However, on the State's recommendation, the court thereafter sentenced Petitioner to three years imprisonment in Cause Number 37206. In response to Petitioner's motion to reconsider this sentence, Judge Ashby specifically denied Petitioner's motion to enforce the written agreement in plea and disposition. Petitioner's appeal in Cause Number 37206 is from the District Court's refusal to enforce the written agreement's sentencing provision or vacate the entire agreement.

Facts in Cause Number 37738:

Simultaneous with the criminal investigation in Cause Number CR-37206, Petitioner became involved in civil litigation instituted by Andrew Swarthout, Director of the New Mexico Division of Fiancial Institutions (DFI), against Guaranteed Equities, Petitioner's wholly owned company. This litigation was settled by the appointment of Harold Douglass, a DFI employee, as trustee of Guaranteed. Directly at issue below and in this petition is the lawfulness of Douglass' intercepting, opening and sharing with criminal investigators of personal mail addressed to Petitioner and others at Guaranteed.

The fact that Douglass had intercepted and opened Petitioner's mail, including attorney/client mail, was objected to by Petitioner from the outset. Mid-trial, in discovery, the tardiness of which is also in isue, Petitioner's counsel first obtained disinterested corroboration of this claim and further discovered evidence that Douglass was the "confidential informant" who had provided information to criminal investigators sifting through Petitioner's affairs. At trial, Douglass resolutely denied opening any mail, but this claim was refuted by three other witnesses, including one called by the State. An immediate motion was made for a taint hearing. Petitioner's counsel made an offer of proof that Douglass had committed criminal violation of several statutes relating to interference with the mails, transmitted the fruits of this crime to Attorney General's Investigators preparing the case against Petitioner, and that Douglass had committed perjury in his trial testimony. The District Court refused to grant a hearing.

On the second day of trial a dispute arose between counsel for Petitioner and counsel for the State concerning the timeliness of the discovery of fourteen tape recordings containing conversations surreptitiously recorded between government investigators and Petitioner and others. Counsel for Petitioner alleged misconduct and prejudicial delay in that the existence of the tapes was not disclosed until the eve of trial and in that the tapes were not made available untl the trial was well underway. Counsel for the State disputed these facts, but objected to a hearing to establish a basis upon which the court could rule. The District Court refused to conduct a hearing on the disputed facts. The tapes, received and reviewed by defense counsel after three days of trial, provided direct evidence corroborating Petitioner's claim that Harold Douglass and other government agents had criminally intercepted his personal mail without warrant or probable cause and made use of the fruits of this search in the course of the investigation leading to Indictment CR-37738. This issue too was focused by timely motions mid-trial and by formal post-trial motions brought by Petitioner. These motions were denied.

During the course of the investigation leading to Indictment CR-37738, the grand jury heard testimony of, among others, Richard J. Grodner and Eric Prelo, attorneys who represented Petitioner and Guaranteed. Neither attorney raised the attorney/client privilege, nor did they notify Petitioner of the grand jury investigation into his affairs. Petitioner first learned that his attorneys had testified against him after the indictment was returned and he had been arrested under a warrant issued pursuant to it. At no time prior to his arrest was Petitioner aware that his attorneys had been compromised by State's investigators. Accordingly, Petitioner had no timely opportunity to claim attorney/client privilege, seeking judicial intervention to prevent this agregious violation of the ethical obligation of his and the State's attorneys.

At trial, the court permitted Prelo and Grodner to testify to conversations allegedly in furtherance of a never specified crime or crimes charged in the indictment. The only crime which by its terms related to Petitioner's attorneys (Count 16 of Indictment CR-37738) charged Petitioner with solicitation of Grodner to commit an unspecified felony. No facts supporting this charge were proved and this count was dismissed by the District Court at the conclusion of the State's case in chief. Notwithstanding repeated motions objecting to their testimony both before the grand jury and at trial, the District Court permitted the indictment to stand and Grodner and Prelo's testimony to be considered as part of the State's evidence.

David King, another attorney representing Petitioner, was also called by the State to testify at trial, over objection, as to conversations he had with Petitioner. King refused to testify until directly ordered to do so by the court. Thereafter, King related the substance of two conversations with Petitioner and authenticated a transcription of a tape recording of the second of the two conversations. Although the conversations indicated that Petitioner was not at all a participant in the crimes charged in Indictment CR-37738, the State was permitted to argue that Petitioner's statements, made in confidence to his own lawyer, were false

exculpatory statements made in furtherance of an effort to disguise his allegedly criminal misconduct.

Madeline Gooch, an examiner of questioned documents called by the State, proved unable to testify with certainty that any of the so called forgeries alleged in Indictment CR-37738 had been committed by Petitioner. Faced with a total failure of proof, the State was permitted, over objection, to elicit Gooch's expert opinion that the control handwriting samples voluntarily provided by Petitioner demonstrated an effort by him to disguise his true handwriting. (Miss Gooch had not been present when the exemplars were provided.) The State argued that, although Petitioner was not the actual forger of the checks in question, he had aided and abetted unidentified others in "forging" his own name to instruments payable to him. In this light, Gooch's testimony was irrelevant on the forgery counts for which she had been called to testify.

A somewhat different basis for admitting Gooch's testimony was advanced at the conclusion of the trial and in the Court of Appeals. Here, it was argued that Petitioner had disguised his handwriting, not in an effort to prevent his identification as the author of the questioned signatures, but as a kind of admission by misconduct of sinister involvement with the questioned checks. Petitioner was a "bad man," attempting to impede and delay Gooch's efforts to ferret out his unknown accomplice in forging his own signature upon the questioned documents. Gooch's testimony, the State's arguments from it, and the District Court's related jury instruction were all vigorously opposed by Petitioner as legally unsound, misleading and prejudicially confusing to the Jury. At issue in this petition is the competence, materiality and relevance of Miss Gooch's testimony and the prejudice to Petitioner of permitting the jury to hear this and other evidence relating to the now reversed "forgery" counts of Indictment CR-37738.

Defendant was convicted after twelve days of trial on fifteen counts of the seventeen counts charged in Indictment 37728. Count Seventeen (Racketeering) was dismissed by *nolle prosequi* on the first day of trial. Count Sixteen (Solicitation of Grodner) was dismissed at the conclusion of the State's case.

On January 30, 1985 the District Court sentenced Petitioner to nine years imprisonment on his conviction in Cause Number CR-37738, sentence to run consecutively with a three year sentence imposed in spite of the terms of his his [*sic*] negotiated guilty plea in Cause Number CR-37206. Petitioner is a married man living with and supporting his wife and two pre-school age daughters. He has no prior convictions. On February 6, 1985, the court denied Petitioner's motion to reconsider the severity of these sentences.

A timely appeal was filed by Petitioner. On December 31, 1985, the Court of Appeals handed down an opinion reversing Petitioner's conviction on seven of the eight counts of forgery in Cause No. CR-37738, but affirming Petitioner's conviction and sentences in all other respects. No further action has been initiated by Petitioner in the District Court or Court of Appeals.

BASIS FOR GRANTING CERTIORARI

Certiorari is appropriate in this case because, unless the conviction below is overturned, a grave miscarriage of justice will result. Moreover, the District Court's rulings and Court of Appeals decision raise substantial issues concerning: 1. Due Process of Law, Search and Seizure, and Right to Counsel under the United States and New Mexico Constitutions; 2. the consequences of the State's interference with performance under a plea bargain; 3. sufficiency of evidence and prejudice to the accused when improper charges are reversed on appeal without setting aside related charges heard by the same jury; and 4. Cruel and Unusual Punishment under the United States and New Mexico Constitutions.

The Court of Appeals decision is inconsistent with opinions of this Court and the Court of Appeals in the following cases: *Hunter v. Kenney*, 77 N.M. 336 (1967); *State v. Alberts*, 80 N.M. 472 (Ct. App. 1969); *State v. Bazan*, 90 N.M. 209, (Ct. App.), cert. denied, 90 N.M. 254 (1977); *State v. Gibson*, 94 N.M. 742 (Ct. App. 1981); and *State v. Sykes*, 98 N.M. 458 (Ct. App. 1982). The decision is also inconsistent with the United States Supreme Court's decisions in: *Brady v. Maryland*, 373 U.S. 83 (1963); *Jackson v. Denno*, 378 U.S. 368 (1964); *Maine v. Moulton*, ____ U.S. ____, 106 S.Ct. 477 (1985); *Messiah v. United States*, 377 U.S. 201 (1964); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Nardone v. United States*, 308 U.S. 338 (1939); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Rochin v. California*, 342 U.S. 165 (1952); *Santobello v. New York*, 404 U.S. 257 (1971); *Spano v. New York*, 360 U.S. 315 (1959); *United States v. Agurs*, 427 U.S. 97 (1976); and *United States v. Henry*, 447 U.S. 264 (1980).

There is substantial public interest at stake in this petition because the opinion below confirms a grave miscarriage of justice, casting doubt upon the rights of the criminal accused in several critical areas of state and federal constitutional law.

SUMMARY OF ARGUMENTS

SEARCH AND SEIZURE: Douglass' warrantless interception of Petitioner's personal mail and sharing of its contents with other government agents denied Petitioner's constitutional right to be free from unreasonable search and seizure.

EFFECTIVE ASSISTANCE OF COUNSEL: The State's solicitation of testimony before the grand jury by Grodner and Prelo was a conscious abridgement of Petitioner's right to attorney/client confidentiality, an essential incident of the constitutional right to effective assistance of counsel.

DUE PROCESS: Petitioner's right to due process of law was abriged [*sic*] on no fewer than six occasions: 1. when State's

lawyers improperly induced Petitioner's lawyers to ignore their duty to raise attorney/client privilege on his behalf; 2. when Petitioner's attorneys improperly testified in the grand jury without giving Petitioner timely notice and opportunity to contest their improper behavior; 3. when Harold Douglass criminally intercepted and opened Petitioner's mail; 4. when Harold Douglass committed perjury in response to questions concerning his criminal misconduct; 5. when the State's attorneys delayed discovery of critical defense evidence until the trial was well underway; and 6. when the trial court repeatedly denied evidentiary hearings on the foregoing issues in the face of clear and explicit offers of proof by Petitioner.

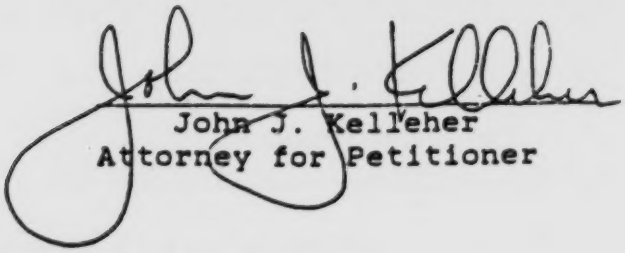
PREJUDICIAL AND INSUFFICIENT EVIDENCE: Having dismissed seven of the fifteen counts against Petitioner, the Court of Appeals should have found the evidence insufficient as a matter of law and reversed on all counts. At a minimum, Petitioner is entitled to a new trial, untainted by the irrelevant and prejudicial evidence relating to the legally untenable claim that Petitioner "forged" or aided and abetted the "forgery" of his own name.

PLEA BARGAIN AND SENTENCE: Petitioner's unrebutted evidence is that the State, not Petitioner, broke the plea bargain contract. The District Court should not have sentenced him to prison. Even granting that the plea bargain agreement failed, the District Court should have withdrawn the plea and permitted Petitioner to contest the State on the merits of the matter. Finally, the sentence imposed should be vacated as a matter of law because on its face it is grossly disproportionate to the circumstances disclosed in the record. A twelve year prison sentence for a first offender convicted of non-violent crimes without identifiable victims is, on its face, cruel and unusual. This Court must exercise its inherent power to undo such a manifest miscarriage of justice.

PRAYER FOR RELIEF

WHEREFORE, Petitioner requests that this Court vacate his conviction and sentence in both causes, dismissing Indictment CR-37738 and permitting petitioner to withdraw his guilty plea in Cause No. CR-37206.

Respectfully submitted,



John J. Kelleher
Attorney for Petitioner

January 20, 1986

H-12

IN THE SUPREME COURT
FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff/Respondent,

vs.

No. _____

FRANCIS THOMAS DEUTSCH,

Defendant/Petitioner.

Filed
1-20-86
VSS

CERTIFICATE OF SERVICE

I hereby certify that the Petitioner's Petition for Writ of Certiorari was mailed to Barbara F. Green, Assistant Attorney General, P. O. Drawer 1508, Santa Fe, New Mexico 87504, on the 20th day of January, 1986, pursuant to Rule 22(c) of the New Mexico Rules of Appellate Procedure, along with a copy of this Certificate.

FRANCHINI, HENDERSON
WAGNER & OLIVER

Kenneth R. Wagner

By: Kenneth R. Wagner for
Gene E. Franchini
Attorneys for Petitioner
P.O. Box 1487
Albuquerque, New Mexico 87103